D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies.

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PHASE 1 ORDER

I. INTRODUCTION

This is a proceeding being held pursuant to the federal Telecommunications Act of 1996 ("the Act") and regulations issued thereunder by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996.[1] The Act and the FCC regulations are designed to facilitate the introduction of competition in the provision of telecommunications services throughout the United States. The Act recognized that many of the physical facilities and operating systems needed to provide local exchange service in a given geographic area are owned and controlled by the incumbent local exchange carrier ("ILEC") and that it would be difficult and inefficient for potential competitors to duplicate these facilities and systems. Accordingly, under procedures set forth in the Act, each ILEC is required to engage in good faith negotiations with each telecommunications carrier who wishes to compete against it. The purpose of the negotiations is to establish the terms and conditions of service for the resale of ILEC services, the provisioning of certain telecommunications services, and other matters necessary (together, an "interconnection agreement") that would enable the potential competitor to enter the marketplace under conditions which would promote robust competition.

The Act and the regulations further provide for binding arbitration in the event that negotiations cannot be concluded within a specified time, upon petition to the state public utility

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1 First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, adopted August 1, 1996 (released August 8, 1996).

commission by either party to the negotiation. 47 U.S.C. § 252. This proceeding is the result of such petitions.

II. PROCEDURAL HISTORY

On July 16, 1996, Teleport Corporation ("Teleport") and New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX"), respectively, filed petitions requesting arbitration pursuant to the regulations. They were docketed as D.P.U. 96-73/74. On July 18, 1996, Brooks Fiber Communications of Massachusetts, Inc. ("Brooks") filed a petition requesting arbitration pursuant to the regulations, which was docketed as D.P.U. 96-75. On August 9, 1996, AT&T Communications of New England, Inc. ("AT&T") and NYNEX, respectively, filed petitions requesting arbitration pursuant to the regulations. They were docketed as D.P.U. 96-80/81. On August 29, 1996, MCI Telecommunications Corporation ("MCI") also filed a petition requesting arbitration pursuant to the regulations, which was docketed as D.P.U. 96-83. On September 19, 1996, Sprint Communications Company L.P. ("Sprint") filed a petition requesting arbitration pursuant to the regulations, which was docketed as D.P.U. 96-94.

Upon agreement by the parties, Paul F. Levy was designated by the Department of Public Utilities ("Department") as the arbitrator for each of these proceedings. At a procedural conference held on September 18, 1996, it was determined that there was sufficient overlap in the issues presented in the various petitions and they were consolidated for hearing.

The proceeding has been divided into four phases: Phase 1 covers issues which were determined by the parties to be ripe for an abbreviated hearing format. In this phase, parties would submit statements of positions and reply statements, no discovery would take place, and a short hearing would be held without witnesses to permit the arbitrator to ask follow-up questions of the parties' attorneys. Phase 2 covers the issue of the appropriate amount by which NYNEX retail services will be discounted for resale. As envisioned by the Act, such prices are to be based on the retail rates charged for such services, excluding the portion attributable to costs that would be avoided by the ILEC in the wholesale provisioning of such services. 47 U.S.C. § 252(d)(3). It is the review of avoided cost studies and other associated matters that will be the subject of Phase 2 prefiled testimony, discovery, and evidentiary hearings. Phase 3 covers other non-cost study issues that are too complex to be handled in the abbreviated format of Phase 1, and it will consist of prefiled testimony, discovery, and evidentiary hearings. Phase 4 covers the issue of the appropriate pricing for unbundled network services and combinations of unbundled network services, and these matters also will be the subject of prefiled testimony, discovery, and evidentiary hearings.

III. ISSUES

This Order decides issues designated by the parties for Phase 1. NYNEX and AT&T agreed to address one set of issues in this phase, and NYNEX and Brooks agreed to address a second set of issues. No other parties presented issues for Phase 1. Initial statements of positions were filed by the parties on October 2, 1996, and reply statements were filed on October 7, 1996. Supplementary statements on the public access line issue were filed on October 18, 1996, by AT&T and October 25, 1996, by NYNEX. A hearing on Phase 1 issues was held at the

Department's offices on October 11, 1996. A number of the issues that were initially listed by the parties for Phase 1 were resolved in bilateral negotiations before the hearing was held, and so this Order deals with only the remaining issues.

The NYNEX/AT&T issues are as follows: (1) whether inside wire maintenance should be available for sale at resale; (2) the conditions under which public access lines ("PALs") should be available for sale at resale; (3) whether AT&T has the right to aggregate the usage of end-user customers to qualify for volume-based discounts; (4) the timetable for notice to AT&T of new and modified NYNEX retail services; (5) and the availability and price of directory listings for individual customers served by Centrex purchased in volume by AT&T.

The NYNEX/Brooks issues are as follows: (1) performance criteria for liquidated damages; and (2) the schedule for liquidated damages.

A. NYNEX/AT&T

1. Inside Wire Maintenance

a. Positions of the Parties

AT&T asks the Department to find that NYNEX is required to offer the maintenance of inside wire for resale, asserting that it is a telecommunications service under the meaning of the Act. NYNEX claims that the provision of inside wire is not a telecommunications service, noting that it has been detariffed in Massachusetts since January of 1987.

b. Analysis and Findings

Inside wiring comprises facilities that are owned or controlled entirely by customers.

NYNEX has no direct interest or control over these facilities. While NYNEX offers inside wire maintenance plans for sale to customers, these services are not tariffed by the Department. They are competitive services and have been since 1987. D.P.U. 86-273. Customers are free to buy such services from NYNEX, from local electricians, or to provide them to themselves. Given these facts, we cannot conclude that the maintenance of inside wire is a telecommunications service as set forth in the Act. As NYNEX correctly notes, it is not "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." 47 U.S.C. §153(43). While it is understandable that AT&T might wish to make use of NYNEX's personnel and facilities to expand its own service offerings to customers to include the maintenance of inside wire, NYNEX is under no obligation to make such services available for resale.

2. Public Access Lines

a. Positions of the Parties

PALs are used by NYNEX and independent payphone providers ("IPPs") to offer coin and non-coin payphone service. Both NYNEX and AT&T agree that PALs should be made available for resale by NYNEX at a wholesale discount to telecommunications carriers. NYNEX, however, objects to AT&T being able to buy PAL service from NYNEX at a discount for resale to an AT&T affiliate. NYNEX argues that if AT&T wishes to use PAL service, it should buy it at the NYNEX retail rate. It cites paragraph 875 in the FCC's rules as not requiring a discount when carriers are purchasing PALs for their own use. AT&T, however, argues that it should be permitted to sell this service to an affiliate after getting the discount from NYNEX, as long as it does so on the same terms as it would to other IPPs. It claims it will do so by maintaining separate accounting records between its service offerings. In its supplemental statement, AT&T comments on the FCC's September 20, 1996 Report and Order, FCC 96-338 ("Payphone Order"), concerning payphone service. While the payphone equipment itself has been deregulated and classified as customer premises equipment, the Payphone Order requires ILEC's to offer PAL services under nondiscriminatory terms to payphone providers. AT&T argues that this supports its position that such services must be made available for resale at wholesale rates to its own payphone affiliate or to IPPs.

b. Analysis and Findings

We look to the Act for guidance. It provides, "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 3(a)(49). As determined by the FCC, IPPs are not telecommunications carriers under the Act, and thus, "incumbent LECs need not make service available to independent public payphone providers at wholesale rates." First Report and Order, ¶ 876. We must find, then, that although AT&T is a telecommunications carrier for many of its services, it is not for its IPP offerings. Separate accounting of the sort described by AT&T (Tr. at 10) is not a sufficient vehicle to permit AT&T to be considered a telecommunications carrier for purposes of offering IPP service to its affiliate. Accordingly, AT&T is not eligible to buy PAL service from NYNEX as a resold service for use by its IPP affiliate.

3. Aggregation of End-User Customers to Qualify for Volume 7-based Discounts

a. Positions of the Parties

AT&T asks the Department to find that, when NYNEX's service are offered for resale on a rate schedule that provides for quantity discounts, AT&T should be able to aggregate the calling volumes of all of its end-users to determine the rate it should pay NYNEX. NYNEX, in turn, states that AT&T should be entitled to a quantity discount for the quantity of service that is delivered through each of AT&T's wholesale billing points. Under the NYNEX view, for example, if AT&T were to have ten points in the NYNEX system through which it purchases business message service, it would eligible for a quantity discount based on the volume passing through each of those points. Under the AT&T view, the combined volume of all ten points would determine the overall price for the service.

AT&T argues that the FCC has established a presumption that it is unreasonable for NYNEX not to offer service based on the combined volume.

b. Analysis and Findings

We note, in passing, that this is currently a hypothetical issue, because the pricing for resale of services has yet to be decided. We will rule on the question, however, on the presumption that it is likely that at least one NYNEX service will be sold for resale with a quantity discount. Presumably, a quantity discount will only be deemed appropriate for a service if that service is characterized by economies of scale, i.e., the cost per unit declines as the total volume increases. The principle we shall apply is that AT&T is entitled to aggregate usage to obtain a quantity discount insofar as its customers' usage parallels the physical economies of scale that served as the basis for the quantity discount. Thus, if the economy of scale is facility specific, e.g., it relies on the amount of traffic handled through a particular switch, then AT&T should be entitled to that quantity discount for all traffic it aggregates through that switch. If the economy of scale is a more generalized feature that is independent of location, then AT&T should be entitled to that quantity discount from combining all of its customers' volume regardless of location.

4. Timetable for Notice of AT&T of New and Modified NYNEX Retail Services

a. Positions of the Parties

AT&T asks the Department to rule that NYNEX must provide advance notice to AT&T of the forthcoming availability of new or modified retail services. It notes that, under the Act, it is entitled to offer such services by purchasing them for resale from NYNEX, but that to do so effectively requires planning in advance of the actual availability date of the services. AT&T argues that, unless such advance notice is given, it will be at a competitive disadvantage vis-a-vis NYNEX and that such a result would run counter to the purpose of the Act and at variance with the FCC requirement that such services be offered in "substantially the same time and manner" as offered by the ILEC. Accordingly, AT&T proposes that NYNEX inform it of the forthcoming availability of new and modified services within three days after NYNEX begins to implement changes to any operational interfaces or procedures related to the introduction of such services.

NYNEX begins by noting that it has agreed to make available for resale its retail services at the same time they become available to its retail customers and to modify its electronic interfaces to support new and modified retail service offerings. It takes the position, however, that the statutory 30-day notice period for new tariff filings provides ample notice to AT&T of new and modified service offerings. See G.L. c. 159, § 19. It asserts that nothing in the Act or the FCC regulations requires an ILEC to provide resellers with any notice period greater than the customary tariff notice period. It further notes that any person may request the Department to suspend a tariff for an additional six months to investigate the filing.

b. Analysis and Findings

We agree with NYNEX, for the following reasons. We find nothing in the Act or the FCC regulations that requires an ILEC to provide competitors with information concerning a potential new service prior to its public announcement, which in the case of Massachusetts, occurs at the time of a tariff filing, which must be submitted thirty days before the service is made available to customers. Id. While we understand AT&T's concern that NYNEX will know about the forthcoming availability of a new or modified service before AT&T does, the ability of NYNEX to conduct such planning and market research and other related functions are an essential part of its ability to compete. AT&T and other competitors have been given strong protection against anti-competitive behavior by NYNEX, i.e., a requirement that any new service using the local exchange network be made available on a nondiscriminatory basis for resale at the same time it is made available by NYNEX for sale at retail. In Massachusetts, AT&T will receive at least thirty days notice of such a service.

While we do not believe AT&T's proposal is required by the Act or the FCC regulations, we further find that it is impractical, both logistically and in the sense of enabling appropriate regulatory review. Imagine, for example, that NYNEX, as part of its research concerning a new service, conducts tests of its switching equipment to see if such a service is technically feasible. Under the AT&T standard, NYNEX would have to notify AT&T of such a test and the potential new service because, in the broad sense, such a test could be viewed as a change to its operational interfaces. On the other hand, perhaps AT&T means that such notice would be provided only after NYNEX makes a corporate decision to offer a new service. If that were the standard, NYNEX could simply undertake research and testing and make preliminary systems changes and withhold the final corporate approval until the very last moment before filing a tariff. Between these two extremes, there are many shades of grey, and it would be immensely difficult to determine the appropriate moment of disclosure. In short, the AT&T standard is an impractical one, for it relies on making the entire NYNEX decision process with regard to new services transparent to all of its competitors and the Department, and would require a regulatory standard of review of such decision-making process that would be excessively burdensome on the Department and NYNEX. Accordingly, we find that NYNEX's statutory thirty-day notice period is a sufficient period within which to notify AT&T of the availability of new and modified services.

5. <u>Availability and Price of Directory Listing of Single Line End-user Customers Served by Centrex Purchased by AT&T</u>

a. <u>Positions of the Parties</u>

Centrex is a service provided by NYNEX which offers customers Private Branch Exchange ("PBX")-like features (intercom, direct-inward-dialing, etc.) through its central office facilities. Under current tariffs, each retail Centrex customer is permitted to have one "free" white and yellow page listing, and additional listings must be purchased. AT&T plans to buy Centrex service for resale from NYNEX, and it would like to have the opportunity to offer each of its retail customers the same one "free" white and yellow page listing, while aggregating usage to qualify for volume discounts. It argues that it must be able to do so to compete with NYNEX's retail offering, to be in the same position as NYNEX when NYNEX sells Centrex to end-users.

NYNEX argues that, while it is willing to offer Centrex service for resale at a discount from the retail tariff, AT&T has proposed a fundamental restructuring of the service. Free extra listings are not offered to retail customers and should not be offered to wholesale customers. NYNEX notes that Centrex is generally offered under a quantity discount scheme today, in which the price of individual main lines drops as the number of main lines increases. It explains that one reason such a quantity discount is possible is because the company only offers one free listing. It asserts that AT&T can purchase additional listings at the wholesale discount and resell such listings to retail customers under whatever terms it desires.

b. Analysis and Findings

While a subsequent phase of this proceeding will deal with the specific rates for resale of Centrex, we can reach a conclusion as to this directory listing issue in the current phase. In Phase II, we will establish a fair wholesale discount for Centrex service. One component of that phase will be to establish the wholesale price of main Centrex lines, and one component will be to set the wholesale price of directory listings. The prices we set will protect both AT&T from being overcharged and NYNEX from being made less than whole. Under these forthcoming rates, AT&T will be able to purchase both main lines and directory services in whatever quantities it deems appropriate to reach its perceived market.

If we were to rule today that AT&T was entitled to extra directory listings at no additional cost because it plans to sell Centrex service to multiple customers, we would be endorsing the concept that AT&T should get something for nothing. There is a cost to providing additional listings, and AT&T should pay that cost. Were NYNEX ordered to provide such additional listings under the terms requested by AT&T, it would be required to subsidize the cost of this aspect of the service to benefit its competitor. We find no such requirement in the Act or the FCC regulations. Accordingly, AT&T's request is denied.

B. NYNEX/Brooks

1. Performance Criteria for Liquidated Damages

a. Positions of the Parties

Both NYNEX and Brooks agree that it is appropriate to have a liquidated damages clause in their interconnection agreement. Such a clause offers financial protection to Brooks if NYNEX fails to satisfy its performance obligations under the agreement. This is appropriate because NYNEX will maintain control over its network, leaving Brooks dependent on its competitor to maintain and repair service to Brooks' customers. Absent a liquidated damages clause, Brooks would be left to litigate the financial effect of service deficiencies, a burden on a new entrant to this telecommunications marketplace. Also, the threat of financial loss to NYNEX for poor service performance to Brooks' customers could help avoid the possibility that NYNEX service would, in fact, be substandard.

While there is an agreement on these general principles, there is disagreement on how they should be applied in this interconnection agreement. Brooks asserts that it is receiving discriminatory treatment from NYNEX, when compared to other carriers with whom NYNEX has already reached agreement on interconnection terms and conditions. In particular, Brooks is concerned with the percentage limitation for out-of-service repairs proposed by NYNEX. The draft interconnection agreement under discussion by Brooks and NYNEX provides that NYNEX will complete a certain percentage of out-of-service repairs within 24 hours. Liquidated damages would apply if NYNEX does not meet this standard.

The problem, says Brooks, is that the standard proposed by NYNEX treats Brooks' primary service territory differently from the rest of the state. It summarizes NYNEX's proposed percentage limitation on out-of-service repairs as follows:

	10/1/96 through 5/21/97	6/1/97 through 12/31/97	1/1/98 through 6/30/98	7/1/98 and thereafter
Zone 1 (Boston)	75%	75%	80%	80%
Zone 2 (rest of LATA 128)	70%	75%	75%	80%
Zone 3 (rest of state)	70%	70%	70%	75%

Brooks, which intends to provide local exchange service in Springfield (in Zone 3), contends that there is no rationale for such disparate treatment of the different regions of the state. It further asserts that the other two carriers, MFS Intelenet of Massachusetts, Inc. ("MFS") and Winstar Wireless of Massachusetts, Inc. ("Winstar"), who agreed to this standard, have no current intentions of serving customers outside of Boston and the rest of LATA 128, and that therefore their acceptance of a lower standard in Zone 3 is irrelevant.

A second issue raised by Brooks is that NYNEX has refused to make any commitments for liquidated damages for poor quality of service to residential customers. Absent such a standard, argues Brooks, it has no recourse if NYNEX fails to maintain reasonable service standards for Brooks' residential customers. It claims that this and the geographical deaveraging set forth in the chart above run counter to the spirit of the service quality standards set forth by the Department in NYNEX's incentive regulation plan. See NYNEX D.P.U. 94-50, at 235-238 (1995). Brooks says that it is willing to accept the same percentage limitations applicable to MFS and Winstar in the Zone 1 classification and that this limitation should apply to both business and residential customers.

NYNEX begins its argument by stating that a state agency cannot craft new liquidated damages and order their inclusion in an agreement absent the ILEC's concurrence (NYNEX Initial Statement at 24). NYNEX says that while it has no intention of providing poorer quality of service in different areas of Massachusetts, the three-zone approach for business service repairs is reasonable in light of the Company's experience in repairing business links in Massachusetts. However, NYNEX asserts that, in any event, that is not the issue, distinguishing between the level of service provided and the application of liquidated damages.

NYNEX further states that it has very little experience in installing and repairing residence links and that such experience is essential before determining if and when liquidated damages should be applied to these links. In making this argument, NYNEX distinguishes between repairing unbundled service links on behalf of another carrier and its many years of experience repairing integrated residential exchange service problems.

b. Analysis and Findings

For this and the following issue, we must first address NYNEX's argument that a state agency cannot craft new liquidated damages and order their inclusion in an agreement absent the ILEC's concurrence. As Brooks notes, the Act is clear that discrimination will not be permitted in the setting of rates for network elements and in the provisioning of services (Brooks Initial Statement at 10-11). See 47 U.S.C. § 251. We agree with Brooks that it would be inconsistent with the Act to permit discrimination in related financial features of the interconnection agreements.

In reaching this conclusion, we are mindful of NYNEX's contentions that its commercial experience with one or another carrier might support a different approach to liquidated damages from that offered, say, to Brooks (Tr. at 52-53). That experience might be based on prior business dealings, or it might be related to concessions made during the negotiations leading to an interconnection agreement.

Were this a set of unregulated financial transactions, NYNEX's argument would certainly be supportable. It is not uncommon for vendors and customers to have individualized contract provisions for liquidated damages, based in part on prior business relationships or based on gives-and-takes in the contract negotiation itself. The market helps discipline these contracts because the customer often has alternative vendors from which it can choose. Here, though, a different standard must apply because NYNEX owns and services the bottleneck facilities in question. Even after reaching agreement with one or more competitors, it has a financial interest in limiting the effectiveness of further entrants to its market and therefore retains an incentive to discriminate against certain carriers. Economic theory would suggest, for example, that such an incentive might derive from NYNEX's desire to maintain a significant market share in one geographical area; or, as another example, it might result from a desire to limit the total number of effective entrants to raise the probability of oligopolistic pricing regimes. In summary, we do have a responsibility under the Act to evaluate a party's claim of undue discrimination in the area of liquidated damages. See 47 U.S.C. § 251.

The specific issue before us is whether NYNEX's liquidated damages proposal unduly discriminates against Brooks. Discrimination, where justified by cost differences, physical differences, or other measurable criteria, is not necessarily improper or unjust. Where differential terms and conditions have no basis, however, we must find undue discrimination and offer a remedy. In this case, the burden must lie with NYNEX to demonstrate that the differentials contained in the proposal it has offered Brooks have a sound substantive basis. As we discuss below, we find that it has not done so.

We recognize in reaching this conclusion that NYNEX has offered the same liquidated damages provisions to Brooks as to Winstar and MFS. In this regard, its treatment of Brooks vis-a-vis other carriers might not, at first blush, appear to be discriminatory. One might argue that Brooks could overcome the deficiency in NYNEX's approach simply by offering service in all parts of the state. However, this result would be analogous to "blaming the victim", penalizing a carrier for its choice of markets and requiring it to adjust its business plan because of an unsupported proposal by the ILEC. As Brooks notes, the market it seeks to serve is in Zone 3, while the other carriers intend to serve other parts of the state. One can scarcely have expected the other carriers to negotiate hard on behalf of a service territory in which they have little commercial interest; and Brooks should not be bound by the terms of an agreement among other parties that unfairly works to its detriment.

We also understand NYNEX's position that one can distinguish the liquidated damages issue from the quality of service issue, but in the absence of another metric by which the liquidated damages provision can be measured, we are left to rely on established quality of service standards. Thus, we cannot accept NYNEX's assertion that its proposed liquidated damages provisions are unrelated to the level of service it is expected to meet in the state.

We first address the issue of geographical deaveraging. NYNEX has offered no justification that it should expect to experience different levels of service quality in the three zones of the state into the future. It says that it needs more experience to determine an appropriate standard of repair, and yet it offers a detailed schedule of performance criteria that maintains a differential among the three zones, both in intermediate years and for an indeterminate period into the future. One could reasonably conclude from NYNEX's proposal that it intends to maintain a lower level of service to carriers in Zone 3.

The Department does not set different service quality standards for different parts of the state. D.P.U. 89-300, at 305 (1990); D.P.U. 94-50, at 235-238 (1995). While we recognize that the standards we have set are for NYNEX's retail service offerings and that the provision of unbundled service elements to other carriers will involve different repair procedures, there is no a priori reason to believe that such procedures will make repairs occur more slowly or more quickly. Indeed NYNEX and Brooks offered equally persuasive reasons as to why the result could go in either direction (Tr. at 44-49). Accordingly, we conclude that there is no substantive reason to incorporate geographically deaveraged service standards as the underlying rationale for liquidated damages.

We now turn to the remedy concerning the liquidated damages provisions for business service. In the absence of support for the NYNEX proposal, we must take its word and assume that it will be endeavoring to meet the same high level of service standards throughout the state. Accordingly, we agree with Brooks that NYNEX should be required to offer Brooks the same liquidated damages performance measures based on the same percentage limitation for out-of-service repairs as those that it has applied to Zone 1 in its Winstar and MFS agreements.

The residential service standard presents a different issue. Here, the issue is not discrimination between what NYNEX has offered Brooks and what it has offered Winstar and

MFS. Indeed, it is offering exactly the same standard to all three carriers; i.e., no liquidated damages provision whatsoever. Thus, the question is whether the absence of such a provision gives Brooks sufficient protection from the potential for monopoly abuse by NYNEX. That Winstar and MFS find no need for such a provision is not the issue. The point is that Brooks, in its desire to compete against NYNEX using NYNEX residence facilities and repair services, fears that it would have no recourse in the event of NYNEX's failure to satisfy repair service standards. We must judge whether Brooks is justified in this concern and whether we should accept Brooks' argument that NYNEX be required to offer liquidated damages performance measures based on a residence-based percentage limitation for out-of-service repairs.

First, we find that, absent a liquidated damages provision or some other incentive system, NYNEX does have a corporate interest in providing a lower quality of repair service to Brooks. Brooks is, after all, a competitor relying on NYNEX's facilities and repair services. Were Brooks' customers to experience lower quality repair service than what is available from NYNEX, it would adversely affect Brooks' ability to compete. We agree with Brooks that the only method of ensuring that NYNEX provides Brooks' residence customers with a comparable level of service quality is to introduce financial incentives for NYNEX to perform such services at a comparable level. Liquidated damages provisions certainly provide such an incentive, and there are also other possibilities as well. For example, in addition to liquidated damages provisions, the agreement might contain a provision in which NYNEX receives a financial benefit for exceeding its own service standard in repairs conducted for Brooks customers.

While we agree that the NYNEX/Brooks interconnection agreement needs a financial incentive system for residence repair service, the record does not support Brooks' position that the same standard be imposed as for business service. In D.P.U. 94-50, the Department accepted different business and residential repair service standards, and we find no reason to believe that a different standard should not apply for services for resale as well. D.P.U. 94-50, at 235-238. However, the record is not sufficient for us to design a specific standard. Accordingly, we direct NYNEX and Brooks to reconvene their negotiations, with the findings of this Order in hand, in the hope that they can reach an agreement on specific terms. If such an agreement is not reached within two weeks of the date of this order, parties should file supporting documentation for specific terms of such a provision.

2. Schedule for Liquidated Damages

a. Positions of the Parties

Brooks asserts that the schedule for liquidated damages offered by NYNEX is discriminatory. It notes that, in the NYNEX/MFS agreement, NYNEX agreed to pay MFS liquidated damages of $75,000 for failure to meet its performance criteria for three consecutive months. In contrast, NYNEX's proposal to Brooks is that Brooks must install 5,000 links and maintain a monthly specified activity threshold (i.e., new orders) of 750 links in order to receive the same liquidated damages treatment as MFS.

NYNEX says that it has offered Brooks the same terms as those reached with Winstar, a sliding scale that begins with 250 installed links and at 5,000 reaches the $75,000 damage figure.

It explains that the MFS agreement does not have a sliding scale because of the experience NYNEX already had with MFS. It argues that Brooks' proposal is extreme, in that it would require NYNEX to pay liquidated damages of $75,000 regardless of the number of lines in service. It contends that there should be a transition period over which the parties gain experience in installing and maintaining links and that relating the amount of liquidated damages to the number of links in service is a fair and equitable means for addressing the issue and protecting Brooks' interest.

b. Analysis and Findings

We accept NYNEX's view that it is reasonable to scale the liquidated damages to the number of links in service, for the second reason offered: such a scale would enable the parties to gain experience in installing and maintaining links. However, Brooks has also provided an equally persuasive reason for requiring the higher level of damages even when a smaller number of links are in service, as this is a vulnerable time in the development of a new business, and service quality problems can effectively keep it from becoming a viable long-term competitor (Tr. at 53-55).

The issue before us, however, is not the rationale for a specific plan. It is whether NYNEX's proposal to Brooks is discriminatory in that it varies considerably from that offered to MFS. NYNEX contends that its commercial experience with MFS supports a different approach to liquidated damages from that offered Brooks. It also asserts that the Brooks provision is the result of a series of concessions and offers made during the course of the negotiation of that agreement (Tr. at 37-39). We have dealt with these arguments above and must conclude that NYNEX's proposal is discriminatory. We add, with regard to the latter argument, that to accept it would render the entire arbitration process a nullity. To say that the Department may not decide particular unresolved aspects of the interconnection agreement because the previous negotiations have resulted in some trading on issues would leave this process with no purpose.

Given our conclusion, NYNEX has two clear alternatives that would eliminate the discrimination we have found. It has the option of revising the MFS agreement to be in accord with that offered Winstar and Brooks, or it could amend the Brooks agreement to correspond with the MFS agreement.

IV. ORDER

After notice, hearing and consideration, it is

ORDERED: That the issues under consideration in this Phase 1 be determined as set forth above; and it is

FURTHER ORDERED: That the parties incorporate these determinations into a final agreement, setting forth both negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to the Section 252(e)(1) of the Act, within thirty days of the date of the close of this proceeding; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

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John B. Howe, Chairman

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Janet Gail Besser, Commissioner